UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

District Council 9, International Union of Painters & Allied Trades, AFL-CIO[1]
Employer

and **Case No. 2-RD-1512**

Teri Muroff, An Individual
Petitioner

and

Local 153, OPEIU, AFL-CIO
Union

DECISION AND ORDER DISMISSING PETITION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on July 20, 2004, before a Hearing Officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2. Upon the entire record[2] in this proceeding, I find that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find that District Council 9, International Union of Painters & Allied Trades, AFL-CIO (the Employer or DC 9) is engaged in the business of representing employees as a labor organization and is an unincorporated association organized under the laws of New York. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $500,000 from the collection of union dues, and purchases and receives at its New York facilities goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New York. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The name of the Employer was amended at the hearing.
[2] The Employer and the Union waived the filing of briefs in this matter. The Petitioner filed a post-hearing statement, which we have considered. This statement included several documents that were neither proffered nor received into evidence during the hearing. These documents are hereby rejected.

3. The parties stipulated, and I find that Local 153, OPEIU, AFL-CIO (Local 153) is a labor organization within the meaning of Section 2(5) of the Act.

4. Local 153 contends that no question concerning representation can properly be raised at this time, because Local 153 did not have a reasonable time to bargain for a successor collective-bargaining agreement following an informal settlement agreement approved by the undersigned in Case No. 2-CA-35197. The Employer argues that a reasonable time to bargain has elapsed. In this regard, the Employer claims that the period to bargain commenced in July 2003, when it signed the informal settlement agreement in Case No. 2-CA-35197, agreeing to resume bargaining with Local 153. For the reasons discussed below, I find that a reasonable time to bargain had not elapsed at the time the decertification petition was filed. Therefore, a question affecting commerce does not exist concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2 (6) and (7) of the Act.

STATEMENT OF FACTS

Since approximately 1959, Local 153 has represented the Employer's office and clerical employees, and Local 153 and the Employer have been parties to successive collective-bargaining agreements, the last of which was effective from November 1, 1999, to October 31, 2002. There are currently six employees in the bargaining unit. Local 153 also represents office and clerical employees employed by the Painting Industry Insurance Fund (the Fund). This collective-bargaining relationship dates back to the late 1940s, and has similarly produced a series of agreements. While DC 9 and the Fund are separate employers, each with its own collective-bargaining agreement with Local 153, DC 9 and Local 153 have had a practice of commencing negotiations for their successor agreement only after the negotiations for the successor agreement between the Fund and Local 153 have been completed. As a significant number of issues have already negotiated, DC 9 and Local 153 would complete their negotiations dealing only with issues of concern to the DC 9 unit.

Local 153 filed an unfair labor practice charge in Case No. 2-CA-35197, in which it alleged that DC 9 violated the Act by recognizing Local 1815, IUPAT, AFL-CIO (Local 1815) as the representative of the employees that had been historically represented by Local 153. The charge also alleged that DC 9 was unlawfully refusing to recognize Local 153 as the lawful representative of those employees. In Case No. 2-CA-35196, Local 153 filed similar allegations against the Fund.

On August 29, 2003, the undersigned approved an informal settlement agreement in Case No. 2-CA-35197 in which DC 9 agreed to (1) recognize Local 153 as the exclusive bargaining agent of its office and clerical employees;
(2) refrain from insisting to impasse upon a members only bargaining unit and other permissive subjects of bargaining; (3) refrain from insisting on illegal subjects of bargaining including benefits provisions that would discourage employees from membership in Local 153; and (4) refrain from giving effect or enforcing any collective-

bargaining agreement covering unit employees entered into by the Employer with its constituent member, Local 1815.[3] The Petitioner, who is the President of Local 1815, the allegedly unlawfully recognized union in that charge, signed the settlement agreement on behalf of Local 1815.[4] Local 153 declined to sign the informal settlement agreement and appealed its approval to the General Counsel's Office of Appeals, asserting that the agreement failed to remedy all of the Employer's conduct and that Local 1815 had indicated its disdain for the provisions of the settlement based upon comments made by Teri Muroff, President of Local 1815 and Petitioner herein. On October 27, 2003, the General Counsel denied Local 153's appeal.[5]

On or about January 8, 2004,[6] the Fund and Local 153 commenced negotiations for a successor agreement. During the negotiations, and in keeping with the parties' practice, Richard Lanigan, Local 153's Secretary-Treasurer, and Howard Wien, attorney for both DC 9 and the Fund, agreed that the negotiations between DC 9 and Local 153 would commence once the negotiations between the Fund and Local 153 were completed. Between January and May, representatives of Local 153 and the Fund held eight or nine bargaining sessions, and in June and July, the parties exchanged drafts of the proposed agreements through regular mail and by e-mail. By July 19, Local 153 and the Fund had executed a successor collective-bargaining agreement.

On June 18, 2004, Local 153 and DC 9 met to complete negotiations for their successor agreement. Sedora Villa, Business Representative, led the negotiations on behalf of Local 153, and attorney Howard Wien led the negotiations on behalf of DC 9. At the June 18 meeting, using the Fund agreement that was near completion, DC 9 and Local 153 completed all the terms for a successor agreement, except for vacation language and the allocation of pension contributions for new hires. At that meeting, DC 9 presented its proposal for pension contribution allocations.

On June 19, Villa sent Wien a copy of the 1999-2002 collective-bargaining agreement between Local 153 and DC 9. On June 24, and again on June 28, Wien sent an e-mail message to Villa asking for Local 153's response to DC 9's proposal regarding annuity contributions. On June 28, Villa sent an e-mail response to Wien stating that she had not had a chance to speak to Richard Lanigan about his proposal. On July 1, Wien sent an e-mail message to Villa in which he attached a draft of the agreement between DC 9 and Local 153. That draft agreement reflected the parties' agreement on modifications to the vacation provision. Villa made certain modifications to the contract that she received from DC 9, and e-mailed it back to Wien on July 5.

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[3] The Hearing Officer took administrative notice of the informal settlement agreement.

[4] The Petitioner stipulated that Local 1815 is not a party in this proceeding, and asserted that Local 1815 disclaims any interest in representing DC 9's office and clerical employees.

[5] The Undersigned also approved an informal settlement agreement in Case No. 2-CA-35196, in which the Fund agreed to recognize Local 153 as the exclusive bargaining agent of its office and clerical employees. Local 153 declined to enter into the informal settlement agreement, and appealed the approval of the agreement to the Board's General Counsel's Office of Appeals. That appeal was also denied.

[6] Unless otherwise noted, all dates here after refer to 2004.

One of the modifications that Villa made to the contract involved changes to the parties' grievance/arbitration provision. These modifications were not discussed at the parties' meeting of June 18. On July 6, Wien sent Villa an e-mail message stating that Local 153's modifications to the grievance and arbitration procedures were not acceptable. In that message, Wien also reminded Villa that Local 153 had not responded to his proposal regarding the new hires. That same day, Villa responded by e-mail and withdrew the changes to the grievance procedures, and stated that she would speak to Lanigan about his proposal and would speak to him the following day. Villa also stated that she needed to explain the situation regarding the pension contribution issue the bargaining unit employee would be affected. During a telephone conversation on July 7, 2004, Villa informed Wien that Local 153 accepted DC 9's proposal regarding allocation pension contributions. According to Villa, during this telephone conversation she and Wien resolved all the outstanding issues, and Wien agreed to send her language reflecting the parties' agreement. During the same conversation, Villa informed Wien that she still needed to explain the pension agreement to the affected unit employee. Wien testified that the conversation Villa asserts occurred on July 7 did not occur until July 12 and that by July 9 (the date that the instant petition was filed), Villa had not spoken to the bargaining unit employee. Further, Wien testified that he did not send Local 153 a proposed contract reflecting the parties' agreement until after July 9. There is no evidence establishing that the parties were at an impasse at any point during these negotiations.

POSITIONS OF THE PARTIES

The Petitioner contends that Local 153 has been unable to successfully negotiate a contract covering the employees of DC 9 within a reasonable time.

Local 153 argues that the petition should be dismissed based on the Board's contract bar principles. In the alternative, Local 153 argues that the Board should dismiss the petition based on the principles of recognition bar. Local 153 maintains that the Board's decision in *Lee Lumber and Building Materials, Inc.,* 334 NLRB 399 (2001), *enforced,* 310 F.3d 209 (DC Cir. 2002), is controlling, and therefore the applicable reasonable time is a minimum of six months from June 18, 2004, the date that Local 153 and DC 9 commenced negotiations for a successor agreement.

DC 9 argues that Local 153's arguments based on the principles of contract and recognition bar have no merit, and that the Regional Director should therefore process the decertification petition. With respect to contract bar, DC 9 maintains that as of July 9, the time that the petition was filed, the parties had not reached agreement on several substantive issues, and that the parties had not executed an agreement. With respect to recognition bar, DC 9 argues that a reasonable time to bargain had elapsed at the time the decertification petition was filed. In this regard, DC 9 maintains that the reasonable period to bargain should be found to have commenced in July 2003, when it signed the informal settlement agreement in Case No. 2-CA-35197.

DISCUSSION

Contract Bar

When a petition is filed for a representation election in a bargaining unit covered by a collective-bargaining agreement, the Board considers whether a contract exists in fact, and whether that contract conforms to certain requirements. If the Board determines that there is a contract and that it meets certain requirements, the contract is held to bar an election. *Hexton Furniture Co.,* 111 NLRB 342 (1955). One of these requirements is that the contract must be reduced to writing. *Empire Screen Printing,* 249 NLRB 718 (1980). Another requirement is that all the parties must sign the contract before the petition is filed. *DePaul Adult Care Communities,* 325 NLRB 681 (1998).

The most recent contract between Local 153 and DC 9 was effective from November 1, 1999, to October 31, 2002. While Local 153 and DC 9 commenced negotiations for a successor contract prior to July 9, 2004, the date that the Petitioner filed the decertification petition, those negotiations did not result in a written agreement executed by the parties. Accordingly, I find that at the time the petition was filed, there was no collective-bargaining agreement in effect that would bar the processing of the petition.

Recognition Bar

Local 153 argues that the instant petition should be dismissed based on the Board's principles of recognition bar. The Board has long held that an employer's lawful voluntary recognition of a union will bar a petition during a reasonable period of time following such recognition. *See MGM Grand Hotel, Inc.,* 329 NLRB 464, 466 (1999); *Sound Contractors Assn.,* 162 NLRB 364 (1966). DC 9 argues that Local 153's argument has no merit as the "reasonable period" has long passed.

Recognition bar is appropriately invoked following an employer's lawful voluntary recognition of a union. DC 9 and Local 153 have a long standing bargaining relationship, and as such Local 153 did not enter this bargaining as a newly recognized union. Therefore the Board's doctrine of recognition bar is not applicable in the instant case.

The Informal Settlement Agreement

While an analysis under the recognition bar doctrine is not applicable herein, the factors that the Board considers to determine whether an employer and a union have had a reasonable time to bargain following recognition are the same as those that the Board considers in determining the reasonable period following a settlement agreement.

In *Poole Foundry & Machine Co.,* 95 NLRB 34 (1951), *enforced* 192 F. 2d 740 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952), the Board held that an employer that enters into an informal Board settlement with a provision for bargaining is obligated to

honor that agreement for a "reasonable period of time" after executing the agreement without questioning the union's majority status. In *Poole Foundry*, the Board sustained the dismissal of a decertification petition holding that the reasonable time to bargain had not elapsed. The Board held that there could be "no valid question concerning representation raised until a reasonable period of time for bargaining had passed after the settlement agreement." *Caterair Int'l.,* 322 NLRB 64, 67 (1996) (citing *Poole Foundry*). The Board has stated that in determining "reasonable period of time for bargaining," it will focus on whether the union has had a "fair chance to succeed in contract negotiations before their representative status can be challenged." *Lee Lumber,* supra at 401.

The Board recently reaffirmed that in determining whether the parties have bargained for a reasonable time under *Poole Foundry* it considers the following factors:

> Whether the parties were bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties were to agreement, and the presence or absence of a bargaining impasse.

AT Systems West, Inc., 341 NLRB No. 12, at 5 (slip op. Jan. 30, 2004). *See also Gerrino Restaurant*, 306 NLRB 86 (1992); *King Soopers, Inc.,* 295 NLRB 35 (1989). The Board has cautioned that these factors must be considered together, and that none is dispositive individually or entitled to special weight. *Lee Lumber*, at 405.

Critical to determining whether a reasonable period has elapsed is fixing a starting point for that period. The Board has held that in cases such as this, where the bargaining obligation is triggered by a settlement agreement, the critical time period starts from the date of the approval of the settlement agreement. *AT Systems West,* at 6; Gerrino *Restaurant*, 306 NLRB 86 (1992). In the instant matter, the undersigned approved the informal settlement agreement containing an affirmative bargaining obligation on August 29, 2003. Thereafter, Local 153 appealed the approval of the settlement agreement and the appeal was denied on October 27, 2003. Only at the point that the appeal was denied did the approval of the informal settlement agreement become effective and certain. Accordingly, October 27, 2003 is the date on which the reasonable period of time commenced.

The Fund unit employees are closely related to those unit employees employed by DC 9 and as such share many common issues and concerns. As was their custom, the parties agreed in these negotiations to bargain the terms of the Fund contract first. Attorney Howard Wien represented both DC 9 and the Fund in these negotiations. As many of the terms of the DC 9 contract are repetitive of those in the Fund agreement, bargaining was more efficient by proceeding with the Fund contract first. The validity of this practice was validated as the parties reached agreement on all but two issues at

their first session on June 18. The record establishes that by the time the decertification petition was filed, Local 153 and DC 9 had either reached agreement as indicated by Sedora Villa's testimony, or were extremely close to reaching an agreement according to the testimony of Mr. Wien. I do not need to resolve this conflict in the parties' testimony because the record establishes that even if an agreement had not been reached on July 7, it was reached within a matter of days since the issues separating the parties were few in number, and the differences between the parties were insignificant and could be easily resolved. Both DC 9 and Local 153 agree the remaining issues were easily resolved. The only difference in the versions presented by the parties is whether the agreement was reached on July 7 or July 12.

Applying the relevant factors to the facts of this case, I find that a reasonable time to bargain had not elapsed at the time that the petition was filed. While slightly over eight months had elapsed from the time the General Counsel denied Local 153's appeal to the date that the Petitioner filed the instant petition, the parties in effect settled a number of provisions for the DC 9 unit in the negotiations for the agreement for the Fund unit, and since their last meeting continued negotiations via telephone, mail, and e-mail, resolving most, if not all issues by the time the petition was filed. The Board has stated, "when the parties have almost reached agreement and there is a strong probability that they will do so in the near future, we will view progress as evidence that a reasonable time for bargaining had *not* elapsed." *Lee Lumber,* at 404 (emphasis in original). The facts establish that Local 153 and DC 9 had either already reached agreement at the time of the decertification petition or they would do so within days. *See also Top Job Building Maintenance Co.,* 304 NLRB 902 (1991) (reasonable time not elapsed where the parties were in the midst of negotiations, had resolved some outstanding issues and had reasonable prospects of reaching an agreement). The evidence does not establish that Local 153's need to explain the impact of the agreement to one of the unit employees was a condition of an agreement being reached. This fact does not negate a conclusion that the agreement was imminent. In *N.J. MacDonald & Sons*, 155 NLRB 67 (1965), the Board found that a reasonable time had not elapsed where the parties had reduced their agreement to writing, and the union informed employer that it would submit employer's offer to the employees for their approval. Finally, the parties were not an impasse so there does not appear there was any obstacle to the parties reaching agreement after their last communication. Under these circumstances, I conclude that a reasonable time for bargaining had not elapsed as of July 9, the date of the petition.

I am cognizant that the parties were not negotiating an initial contract here. The Board has reasoned that negotiations for initial contracts often occur in "an atmosphere of hard feelings left over from an acrimonious organizing campaign," and thus warrant a longer reasonable time. *Lee Lumber,* at 403; *Livent Realty, a Division of Livent U.S., Inc d/b/a the Ford Center for the Performing Arts*, 328 NLRB 1 (1999) . Even though the instant case does not involve an initial contract, I note that the negotiations ensued only after DC 9 was required to withdraw recognition of Local 1815, and to recognize and bargain with Local 153 as the lawful representative of the Unit. While DC 9 and the Petitioner, as President of Local 1815, executed the settlement agreement, Local 153

appealed the Regional Director's unilateral approval of the settlement agreement contending that the circumstances warranted broader remedial relief. Under these circumstances, I find that these negotiations for the DC 9 contract clearly occurred in an atmosphere akin to that found in the negotiations for an initial contract.

Based on the foregoing, I find that the petition was filed before Local 153 and DC 9 had a reasonable time to bargain following the General Counsel's denial of Local 153's approval of the settlement agreement. Therefore, the instant petition has not raised a valid question concerning representation.

ORDER DISMISSING PETITION

Accordingly, IT IS HEREBY ORDERED that the petition be, and IT HEREBY IS, DISMISSED.[7]

Dated at New York, New York
August 20, 2004

/s/ Celeste J. Mattina
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

[7] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **September 3, 2004.**